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10 April 1995

William F Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M St NW
Washington
DC
20554

DOCKET FILE COPY ORIGINAL

Dear Mr Caton,

MARKET ENTRY AND REGULATION OF FOREIGN-AFFILIATED ENTITIES

I refer to the Notice of Proposed Rulemaking adopted on 7 February 1995 about Market Entry and Regulation of Foreign-Affiliated Entities, docket IB 95/22. I attach the original and ten copies of a document setting out the views of the British Government. These comments are for the public record.

Yours sincerely

Pat Phillips

Miss P R Phillips
First Secretary, Agriculture and Trade Policy

Before the
FEDERAL COMMUNICATIONS COMMISSION 53
Washington DC 20554

In the Matter of	)	
	)	
Market Entry and Regulation of	)	IB Docket No•95-22
Foreign-affiliated Entities	)	RM-8355
	)	RM-8392

COMMENTS OF THE BRITISH GOVERNMENT

1. The British Government shares the goals expressed in the Notice of Proposed Rulemaking (NPRM) and welcomes the finding that (paragraph 1) "allowing foreign carrier entry into the US international services market will further the public interest by providing additional competition". This has indeed been our experience. We have long welcomed investment into the United Kingdom by all carriers, regardless of nationality, including no fewer than 22 US operators. We have seen more effective competition result, to the benefit of the private and business consumer, and to the British economy as a whole.

2. In general we believe that the three goals set out in the NPRM, which are to open the US market to effective competition, to remove some of the delay and uncertainty in the current s.214 and s.310 authorisation procedures and to send a positive signal to other countries about the benefits of competition, are right. However, we are concerned that some of the proposals could act in a fashion counterproductive to those goals. In particular, the proposed market entry standard could introduce new sources of uncertainty and delay, rather than streamlining the authorisation process under s.214 and s.310. This could require additional resources in the Commission to deal with arguments aimed simply at delaying or preventing market entry.

3. We also note that the Notice does not deal with the question of setting time limits, after the completion of the comments period, for the Commission to grant or reject s.214 or s.310 petitions. The Commission has raised the question of such a set

period informally in the past. The present lack of time limits has meant certain applications taking several years to be resolved. The Commission may wish to consider introducing such a time period as an additional step towards transparency and streamlining.

4. Based on the positive experience of the UK, we offer the following comments on the FCC's three goals as set out in the NPRM.

Promoting Effective Competition

5. The NPRM recognises that the FCC's first goal, promoting effective competition, can be achieved by welcoming foreign investment and activity in the US market. The UK can fully endorse this approach. This has indeed been the UK's experience. We now have 148 companies licensed to build and operate their own facilities within the UK (local and long distance) and to offer a range of international services. Many more are offering services under class licences. Our policy of permitting cable companies to provide telephony has led to over £4 billion ($6 bn) investment in the past 3 years, with a total £10 bn (over $15 bn) expected by the year 2000, in addition to substantial investment by BT of some £2 bn (over $3 bn) annually. A further source of competition and investment is mobile and PCS operators. In all sectors, the nationality of the operators has been irrelevant, and US operators such as Nynex, US West, AT&T, Sprint, IDB Worldcom, MFS and COLT have been active participants in the UK market. We have welcomed this investment as a boost to UK employment and improvement of our infrastructure and service to the consumer.

Preventing anti-competitive conduct

6. The FCC's second goal, preventing anti-competitive conduct, is clearly key to achieving the first goal. Meeting in Brussels in February 1995, G7 Ministers emphasised the importance of an

adaptable regulatory framework to promote dynamic competition. In developing our regulatory safeguards, we have sought to minimise the administrative burden both for companies and the regulator. There is no *a priori* assumption of anti-competitive behaviour, and no general and automatic requirement for tariff filing or reporting. The Director General of Telecommunications does, however, have powers to require information to be produced where this is needed to enable him to secure compliance with licence conditions, to pursue complaints or to investigate possible breaches of the Telecommunications Act. These powers are used to assist market entry and are generally applied against incumbent UK operators rather than market entrants, whatever their origin.

7. We therefore welcome the proposal to reduce the tariff filing requirement for dominant operators from 45 to 16 days, in line with the requirements for all carriers. But the Commission does need to consider, in defining dominance, the real market power in the US of the carrier in question, rather than often hypothetical risks set out in public comments in s.214 procedures. The Commission should note that AT&T, although 3 times larger in its telecommunications services turnover worldwide than any other operator in the UK market, is treated as lightly in almost all respects in its UK licence as other new market entrants in the UK, although, as in other licences, there are safeguards which can be applied in the case of anti-competitive actions by the licensee.

8. Non-dominant treatment criteria under International Services Order: We would further ask the FCC to consider whether any other administrative procedures could also be reduced or eliminated without harm to the public interest. We would recall that the Order on International Services (7 FCC 7333 (1992)) provided for the Commission to treat as non-dominant in the US foreign affiliate carriers whose parent company, while dominant in its home market, was subject to sufficient regulation and competition in that home market. The UK hopes that any new

Order will not undermine or replace this provision of discretion by the Commission with something more restrictive. As mentioned above, AT&T and other US operators are not subject to onerous *a priori* tariff filing obligations or other requirements which might delay or hinder entry into the UK market. The UK regulator is keen to enable licensees to use their licences to the full to provide competitive services to UK consumers, and tries to avoid unnecessary obstacles to such provision of service.

9. The US regulatory regime already encompasses significant safeguards, in particular through its route by route authorisation process. We hope that the Commission, in the interests of the US consumer, will avoid creating additional difficulty to foreign carriers providing services in the US. An effective requirement is that of non-discrimination by dominant operators. The dominant facilities-based operator should not discriminate unfairly between customers (including competitors seeking access to the network) nor in the prices it charges to its own service business and to competitor service providers. Effective competition relies on both these aspects of non-discrimination. While the latter is not required of dominant long-distance carriers in the US, we do require this of BT in the UK (but not of new market entrants). We suggest that this is an approach which the FCC may wish to consider in the light of legislative and judicial moves in the US to remove present MFJ restrictions.

10. Licensing International Resale: The FCC seeks comment on whether private line resellers need separate s.214 authorisation for individual routes. In the UK, in line with our policy to minimise unnecessary regulation, we have found it sufficient to issue a straightforward individual licence for international simple resale (ISR), the terms of which have become largely standardised to avoid unnecessary delay. This applies to those routes which the Secretary of State has found equivalent (currently Australia, Canada, Sweden and the USA). As new

countries are added to this list, ISR licensees can offer services on the new route without further separate authorisation. These licences do not set limits on the number of circuits operated or added by the carrier. Certain competitive safeguards in the licence are triggered in certain circumstances, for example where the licensee achieves a substantial share of a particular market segment. We can recommend this approach to the FCC, and welcome the question being raised in the Notice.

11. We welcome clarification of the requirement for a separate s.214 authorisation (and equivalence finding) for US carriers that use their own facilities for the US half-circuit, but lease the foreign half-circuit. This is also consistent with our definition of ISR, namely a voice or data service which is routed from the public switched network, via an international private leased circuit, to the public switched network of another (equivalent) country.

12. Accounting rates: We share the FCC's goal to reduce international accounting rates to a level that is closer to cost. Until this is achieved, the international telecommunications market will remain distorted and require regulatory vigilance. However, we have considerable concerns about the proposed requirement for the foreign affiliates of US carriers (both facilities-based and resellers), regulated as dominant on any international route, to file with the FCC their accounting rates with all other countries. This would be tangential to the main purpose of the Notice, and raises questions about the basis on which judgements would be made about whether those rates were cost-based or not.

13. We also see difficulties in requiring a company outside US jurisdiction to reveal commercially confidential information which affects a third company also outside US jurisdiction, and which may have no interest in the US market. We believe that, as ISR develops, accounting rates will become less relevant, and

that this provision, creating as it does potential questions of jurisdiction, might sensibly be left to be resolved by increased competition, which will put its own pressure on above-cost accounting rates. The UK notes that while accounting rates are important to carriers, the consumer is most concerned with the tariff he/she has to pay. The final Order might usefully include close scrutiny of tariffs charged to US consumers for international services against the current accounting rates.

Encouraging foreign governments to open their communications markets

14. We share the FCC's third goal of encouraging other governments to open their communications markets. We believe that this should be achieved through pursuit of trade policy, negotiating in multilateral fora such as the WTO, not through introducing reciprocity arrangements in telecommunications regulatory regimes. The commitment of G7 Ministers, at their recent meeting in Brussels, to a successful outcome to the WTO negotiations on basic telecommunications by April 1996 underscores the importance of the multilateral approach.

15. More specifically, the FCC seeks to influence not only the home market of a foreign carrier, but also the 'primary markets' (for which the definition is somewhat vague). It would be difficult enough for a private company to influence government trade policy in its home market, although arguably it may be possible for a government-owned operator. To expect a private company to influence the government of another country, whether or not the latter has a 'significant ownership interest' in the telecommunications operator, is unrealistic.

16. It is helpful that the FCC has sought to clarify that it is "trying to avoid sending a signal that might be misinterpreted as a closing of [US] markets". However, there is an inherent danger that market entry tests will be perceived as such, particularly if the hurdle is set unrealistically high or causes

the administrative breakdown of the authorisation procedure. The UK has always favoured the complete removal of foreign ownership restrictions in all markets, in line with our approach to welcome investment in the UK network regardless of nationality. We would consider it in the meantime best for the Commission to offer waivers on s.310 on a routine basis, and treat foreign companies in the same fashion as US carriers in s.214 procedures, except where the granting of such authorisations can clearly be demonstrated to offer the company in question the ability to distort competition to the detriment of the US consumer. As discussed above, we believe that the safeguards already in place in the US system provide such protection.

17. Equivalency and market entry: In considering liberalisation and market entry, it is important to be clear about the reasons for any departure from an open market for all potential investors. For instance, the UK operates a system of equivalence based not on reciprocal market entry, but on whether regulation and market conditions on the particular route are sufficiently pro-competitive to prevent one-way by-pass of the accounting rate to the detriment of the UK market and consumer. Once a route is found equivalent, foreign carriers can be licensed to operate on that route regardless of UK carriers' access to the country of their origin. The rather different approach set out in the Notice, and we note in current legislative proposals in the US Congress, may be difficult to reconcile with the concept of national treatment under the WTO agreement, which requires signatories to treat foreign suppliers of a service in the same way as suppliers of the nationality of the country in question. As noted above, the UK has consistently adopted an open market approach, and we consider the adoption of the same by other countries will be important to the successful outcome of current negotiations in the WTO. It will be equally important that negotiating countries do not lock themselves in, or encourage other participants to do so, to a rigid bilateral reciprocity approach. This is anyway an

imperfect instrument for seeking market entry, as it can encourage others to close their markets, and only to open them if they have direct interests to trade with the other country. In telecommunications markets worldwide there are still only a few countries with operators seeking a global presence, and many others who may, without a multilateral agreement, see no interest in opening their market to US or other foreign operators.

18. The telecommunications sector is characterised by dynamic growth, a trend towards globalisation, rapid technological developments and innovation. This needs governments and regulators constantly to review how best to meet the consumer's needs (the public interest test). We support the FCC's goals of effective competition and prevention of anti-competitive conduct and believe the UK has much experience to share with other governments seeking to liberalise their markets. We also share the desire to encourage other governments to open their markets to competition, but believe that the WTO is the most appropriate forum for this.